FILED
07-934 JAN 9 - 2008
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

THE CADLE CO, AS SUCCESSOR BY PURCHASE AND ASSIGNMENT OF THE INTERESTS OF SCOTT M. SEIDEL, CHAPTER 7 TRUSTEE FOR THE BANKRUPTCY ESTATE OF JACK E. PRATT, JR., PETITIONER

v.

JACK E PRATT, SR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BRUCE W. AKERLY
Counsel of Record

LINDA D. THAI

Bell Nunnally & Martin LLP
3232 McKinney Avenue
Suite 1400
Dallas, Texas 75204
(214) 740-1430

Attorneys for Petitioner

CURRY & TAYLOR • (202) 393-4141

QUESTIONS PRESENTED

Prior to trial, Petitioner THE CADLE COMPANY ("**Petitioner**") discovered that Respondent JACK E. PRATT, SR. ("**Respondent**") changed a material factual position. Petitioner filed a *Motion to Strike Portions of Defendant's Motion for Summary Judgment, Prohibiting Defendant from Asserting New Defensive Theories, for Consideration of Sanctions, and Request for Emergency Hearing and Status Conference Regarding Same* ("**Motion to Strike/Sanctions**"). (App. 21a-31a) detailing the change in position and asking the District Court to strike certain pleadings and sanction Respondent and his attorney under Federal Rule of Civil Procedure 11, Fed. R. Civ. P. 11 ("**Rule 11**"). Shortly thereafter Petitioner's counsel sent a letter to Respondent's counsel detailing the objectionable pleadings and argument, asking that they be retracted, and again threatening sanctions under Rule 11. (App. 14a-15a, Ex.1). Petitioner then supplemented the Motion to Strike/Sanctions and again urged imposition of sanctions under Rule 11 (the "**Supplement**"). (App. 16a-20a). The offending factual position was not withdrawn. In his response to the Motion to Strike/Sanctions Respondent did not complain that the request for sanctions was procedurally defective. On the eve of trial, the District Court denied Petitioner's Motion to Strike/Sanctions, in part, and carried the request for sanctions through trial. No ruling was made on the motion during or following trial. Petitioner was forced to defend against both factual positions at trial.

Following trial, but before judgment was entered against Petitioner, Petitioner filed a second *Motion for Sanctions Under Federal Rule of Civil Procedure 11,*

Combined With Brief in Support Thereof ("**Second Motion for Sanctions**") against Respondent and his counsel asserting the same grounds as set forth in the Motion to Strike/Sanctions. (App. 6a-15a). The Second Motion for Sanctions was filed and served more than twenty-one (21) days after Petitioner served and filed the Motion to Strike/Sanctions and Supplement and sent the letter to Respondent's counsel asking him to withdraw the challenged pleadings and notifying him of Petitioner's intention to seek Rule 11 sanctions.

The District Court denied the Motion for Sanctions ruling that Petitioner was not in strict compliance with the procedural requirements of Rule 11(c)(1)(A), which contemplates that a motion for sanctions be served within twenty-one (21) days prior to filing the motion. The Fifth Circuit Court of Appeals affirmed.

The following questions are presented to the Court:

1. Whether the United States Court of Appeals for the Seventh Circuit's decision in *Nisenbaum v. Milwaukee County*, 333 F.3d 804 (7th Cir. 2003), and the decision of the United States Court of Appeals for the Sixth Circuit in *Barker v. Bank One, Lexington, N.A.*, No. 97-5787, 1998 WL 466437 (6th Cir. July 30, 1998)(unpublished), are correct in holding that service of a detailing "letter" or other demand, rather than a "motion," "complies substantially" with the procedural requirements of Rule 11(c)(1)(A); or whether the United States Court of Appeals for the Ninth Circuit's decision in *Barber v. Miller*, 146 F.3d 707 (9th Cir. 1998) and the United States Court of Appeals for the Fifth Circuit's decision in this case and in *Elliott v. Tilton*, 64 F.3d 213

(5th Cir. 1995), are correct in holding that failure to strictly comply with the procedural requirements of Rule 11(c)(1)(A) absolutely precludes consideration of the imposition of sanctions.

2. More specific to the case at bar, whether the Fifth Circuit Court of Appeals' decision in *The Cadle Company v. Pratt, Sr.*, Case No. 06-10468, is correct in affirming the District Court's order denying Petitioner's Motion for Sanctions against Respondent and his counsel for failure to comply with the procedural requirements of Rule 11(c)(1)(A), although Petitioner had served the Motion to Strike/Sanctions and Supplement on Respondent and mailed a letter to Respondent's counsel more than twenty-one (21) days prior to filing its Motion for Sanctions, each of which clearly notified Respondent and his attorney that Rule 11 sanctions would be sought if the challenged pleadings were not withdrawn.

RULE 29.6

Petitioner is not a publicly traded company. There is no parent or publicly held company owning 10% or more of the stock of Petitioner.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 iv

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 3

REASONS FOR GRANTING THE PETITION 8

CONCLUSION 26

APPENDIX

Circuit Court Opinion 1a
District Court Order 3a
Order Denying Petition for Rehearing 5a
Plaintiff's Motion for Sanction under Federal Rule of Civil Procedure 11, Combined with Brief in Support Thereof with Exhibit 6a
Plaintiff's First Supplement to Motion to Strike Portions of Defendant's Motion for Summary Judgment Prohibiting Defendant from Asserting New Defensive Theories, for Consideration of Sanctions, and Request for Emergency Hearing and Status Conference Regarding Same 16a
Plaintiff's Motion to Strike Portions of Defendant's Motion for Summary Judgment Prohibiting Defendant from Asserting New Defensive Theories

for Summary Judgment, Prohibiting Defendant from Asserting New Defensive Theories, for Consideration of Sanctions, and Request for Emergency Hearing and Status Conference Regarding Same.....21a
Rule 11 .....31a

TABLE OF AUTHORITIES

Page

CASES

BARBER V. MILLER, 146 F.3D 707 (9TH CIR. 1998) 9, 12, 13, 15
BARKER V. BANK ONE, LEXINGTON, N.A., NO. 97-5787, 1998 WL 466437 (6TH CIR. JULY 30, 1998) 9, 12, 20
BRICKWOOD CONTRACTORS, INC. V. DATANET ENGINEERING, INC., 369 F.3D 385 (4TH CIR. 2004) 9, 17
CARLTON GROUP, LTD. V. TOBIN, NO. 02-CV-5065-SAS, 2003 WL 21782650 (S.D. N.Y. JULY 31, 2003) 22
CARRUTHERS V. FLAUM, 450 F.SUPP.2D 288 (S.D. N.Y. 2006) 23
COOTER & GELL V. HARTMARX CORP., 496 U.S. 384 (1990) 10
ELLIOTT V. TILTON, 64 F.3D 213 (5TH CIR. 1995) 9, 12, 18
GORDON V. UNIFUND CCR PARTNERS, 345 F.3D 1028 (8TH CIR. 2003) 9, 15
HADGES V. YONKERS RACING CORP., 48 F.3D 1320 (2ND CIR. 1995) 9, 12, 18
IN RE COCHENER, 360 B.R. 542 (BANKR. S.D. TEX. 2007) 21, 22
IN RE M.A.S. REALTY CORP., 326 B.R. 31 (BANKR. D. MASS. 2005) 21, 22
JEFFREYS V. ROSSI, 275 F.SUPP.2D 463 (S.D. N.Y. 2003) 22
LANCASTER V. ZUFLE, 170 F.R.D. 7 (S.D. N.Y. 1996) 23
LITTLE V. TWENTIETH CENTURY-FOX FILMS, NO. 89-CV-8526, 1996 WL 376971 (S.D. N.Y. JULY 5, 1996), VACATED ON OTHER GROUNDS, 111 F.3D 123 (2ND CIR. 1997) 23
NISENBAUM V. MILWAUKEE COUNTY, 333 F.3D 804 (7TH CIR. 2003) 8, 12, 16, 19
RADCLIFFE V. RAINBOW CONSTRUCTION CO., 254 F.3D 772 (9TH CIR. 2001) 14
RIDDER V. CITY OF SPRINGFIELD, 109 F.3D 288 (6TH CIR. 1997) 17, 21

ROTH V. GREEN, 466 F.3D 1179 (10TH CIR. 2006), CERT. DENIED, 128 S.CT. 69 (2007) 9, 16
UNITED STATES EX REL. EITEL V. REAGAN, 35 F.SUPP.2D 1151 (D. ARIZ. 1998) 14, 15, 23

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1927 ..... 13, 16
28 U.S.C. § 1983 16

RULES

Fed. R. Civ. P. 11 ..... 3, 10, 14
Fed. R. Civ. P. 11(c) 13
SUPREME COURT RULES 13.1 2

PETITION FOR A WRIT OF CERTIORARI

Petitioner THE CADLE COMPANY respectfully petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered September 13, 2007, in order to resolve a conflict between (a) the United States Courts of Appeals for the Second, Fourth, Fifth, Ninth and Tenth Circuits, which hold that a party must strictly comply with the procedural requirements of Rule 11(c)(1)(A), and (b) the United States Courts of Appeals for the Sixth and Seventh Circuits, which hold that service of a "letter" or other demand, rather than a "motion," which "complies substantially" with Rule 11(c)(1)(A) may be effective. The Court is presented with a situation in which Petitioner filed a Motion to Strike/Sanctions and Supplement thereto, and served a letter on Respondent's counsel which clearly apprised Respondent and his counsel of conduct violating of Rule 11 more than twenty-one (21) days prior to filing of Petitioner's Second Motion for Sanctions, which was denied by the District Court because Petitioner did not technically comply with the procedural requirements of Rule 11(c)(1)(A). As a result, Respondent's counsel was able to avoid the imposition of sanctions on a technicality. In order to achieve the objective, spirit, and purpose of Rule 11, this Court should hold that substantial compliance with Rule 11(c)(1)(A) may be effective and not preclude the imposition of sanctions, and reverse the Fifth Circuit's decision in this case.

OPINIONS BELOW

The *Per Curium* decision and *Judgment*, entered September 13, 2007, (App. 1a-2a) and *Per Curiam* decision denying Petitioner's *Petition for Rehearing*, entered October 11, 2007, of the United States Court of Appeals for the Fifth Circuit are not published in the Federal Reporter. (App. 5a) The *Order* of the District Court denying Petitioner's Second Motion for Sanctions was entered March 8, 2006, and is also unreported. (App. 3a-4a)

JURISDICTION

The *Judgment* of the United States Court of Appeals for the Fifth Circuit was entered on September 13, 2007. A Petition for Rehearing was timely filed and was denied on October 11, 2007. Pursuant to Supreme Court Rules 13.1 and 13.3, this petition has been filed within 90 days of the denial of rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

This case involves the "safe harbor" provision of Rule 11(c)(1)(A), as amended in 1993, which provides as follows:

> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days

> after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses, including attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

Fed. R. Civ. P. 11 (c)(1)(A). The full text of Rule 11 is set out in the appendix to this Petition. (App. 31a-34a).

STATEMENT

This case has a long history arising out of a chapter 7 bankruptcy filed by Jack E. Pratt, Jr. ("**Pratt Jr.**"), in which Petitioner was a creditor. The duly appointed chapter 7 Trustee brought suit against Respondent, Pratt Jr.'s father, alleging Respondent breached his fiduciary duty to Pratt Jr. (the "**Action**"). Petitioner acquired the chapter 7 Trustee's suit against Respondent from the bankruptcy estate and was substituted as the plaintiff in the Action. Reference of the Action was later withdrawn to the United States District Court for the Northern District of Texas, Dallas Division.

Prior to Petitioner's purchase of the Action, Pratt Jr. was named as a beneficiary under his mother's will (the "**Will**") and Respondent, who had divorced Pratt Jr.'s mother years earlier, was appointed the sole

independent executor of her estate. The chapter 7 Trustee alleged in the Action, *inter alia*, that Respondent failed to make required distributions to Pratt Jr. under the Will and, therefore, breached his fiduciary duty to Pratt Jr. Respondent denied the allegations and claimed he legitimately offset any distribution Pratt Jr. was to receive under his mother's Will against amounts Pratt Jr. owed his mother before she died (the "**Original Position**").

Shortly before the close of discovery, however, Petitioner discovered that the Original Position was untrue and unsupported by documents previously produced by Respondent. After discovery closed, Respondent asserted that he offset Pratt Jr.'s distribution under the Will against loans Respondent had made to Pratt Jr. from his mother's estate (the "**New Position**"). For over two years prior to trial of the Action, Respondent had maintained the Original Position; his assertion of the New Position materially altered the facts of the case.

Respondent and his counsel, Richard B. Schiro ("**Schiro**"), aggressively maintained the Original Position in pleadings filed in the Action, *see e.g., Defendant's Motion for Summary Judgment, Brief in Support of Defendant's Motion for Summary Judgment* ("**Defendant's Motion for Summary Judgment**"), as well as sworn affidavits and deposition testimony of Respondent, his administrative assistant Evelyn Johnstone, and his daughter Jill Pratt. Schiro, who was also Pratt Jr.'s counsel in his bankruptcy, signed and filed the pleadings on behalf of Respondent.

On April 14, 2005, Petitioner filed and served its *Plaintiff's Motion to Strike Portions of Defendant's Motion for Summary Judgment, Prohibiting Defendant from Asserting New Defensive Theories, for Consideration of Sanctions and Request for Emergency Hearing* ("**Motion to Strike/Sanctions**") requesting the District Court (1) sanction Respondent for making false statements in affidavits, deposition transcripts, and trial transcript and (2) specifically, sanction Schiro under Rule 11. (App. 21a-30a)

On April 18, 2005, Schiro filed his *Motion for Leave to File Supplemental Brief in Support of Defendant's Motion for Summary Judgment* (the "**Motion to Supplement**") and attached a new brief and affidavits from Respondent, as well as his administrative assistant Evelyn Johnstone, and his daughter Jill Pratt, which asserted the New Position. Neither the Motion to Supplement, the new brief, nor the new affidavits retracted the earlier pleadings alleging the Original Position.

On April 19, 2005, Petitioner's counsel sent a detailed letter to Schiro by facsimile and first class mail requesting that he withdraw Defendant's Motion for Summary Judgment because it contained statements relating to Respondent's Original Position, which Schiro knew were untrue and unsupported by the documents his client had produced to Petitioner (the "**April 19 Letter**"). (App. 14a-15a, Ex. 1)

On May 3, 2005, Petitioner supplemented its Motion to Strike/Sanctions to include a summary of the incorrect statements contained in Respondent's affidavits, deposition transcripts and trial transcript as

well as Defendant's Motion for Summary Judgment and Brief and Appendix in support thereof ("**Supplement to Motion to Strike/Sanctions**"). (App. 16a-20a)

On May 3, 2005, Respondent filed *Defendant's Response to Plaintiff's Motion to Strike Portions of Defendant's Motion for Summary Judgment, Prohibiting Defendant From Asserting New Defensive Theories, For Consideration of Sanctions, and Request for Emergency Hearing and Status Conference Regarding Same* ("**Response to Motion to Strike/Sanctions**").

Schiro failed to withdraw objectionable portions of Defendant's Motion for Summary Judgment or respond to the April 19 Letter and never notified or attempted to notify the District Court that his earlier pleadings asserting the Original Position presented a false factual position.

On the day of trial, the District Court (1) denied Defendant's Motion for Summary Judgment and Motion to Supplement, (2) denied Petitioner's Motion to Strike/Sanctions, in part, and (3) reserved ruling on Petitioner's request for Sanctions against Respondent (premised on Rule 37 of the Federal Rules of Civil Procedure) and Schiro (premised on Rule 11).

On July 11, 2005, following trial but before entry of judgment in the Action, Petitioner filed the Second Motion for Sanctions (defined above). Petitioner did so because, although it had reserved ruling on the sanctions portion of Petitioner's Motion to Strike/Sanctions, the District Court failed to rule on such matters during or following trial.

The Motion to Strike/Sanctions, Supplement to Motion Strike/Sanctions, Second Motion for Sanctions, and the April 19 Letter all assert the same factual and legal position. All were served on Schiro and, other than the April 19 Letter, were filed with the District Court more than twenty-one (21) days prior to entry of the District Court's *Order* denying Rule 11 sanctions. In his Response to Motion to Strike/Sanctions, Respondent does not assert that the motion was procedurally defective. Neither Respondent nor Schiro ever argued that they did not sufficiently receive notice of Petitioner's request for them to withdraw the challenged pleadings or were unaware that Petitioner intended to seek and was seeking sanctions under Rule 11.

Nevertheless, on March 8, 2006, the District Court entered its *Order* ("**Sanctions Order**") denying the Second Motion for Sanctions. (App. 3a-4a) The Sanctions Order provides, in part:

> Plaintiff's motion for sanctions is denied as Plaintiff failed to comply with the service requirement of Rule 11(c)(1)(A). Additionally, Defendant has adequately explained his change of position.

The Sanctions Order does not address Schiro's conduct or lack of explanation why the challenged pleadings were not withdrawn.

Subsequently, Petitioner filed an appeal to the United States Court of Appeals for the Fifth Circuit challenging, *inter alia*, the Sanctions Order and, in particular, the ruling of the District Court that

Petitioner's "motion for sanctions is denied as [Petitioner] failed to comply with the service requirement of Rule 11(c)(1)(A)." On September 13, 2007, the Fifth Circuit filed its *Per Curiam* decision affirming the Sanctions Order "for essentially the reasons given by the District Court." (App. 1a-2a) A timely *Petition for Rehearing* was also denied, *Per Curiam*. (App. 5a)

This Court should now consider Petitioner's claim that it was in substantial compliance with Rule 11(c)(1)(A) in light of the conflict between the United States Courts of Appeals for the Sixth and Seventh Circuits, which hold that service of a letter or other demand, rather than a motion, "complies substantially" with the procedural requirements under Rule 11(c)(1)(A), and the United States Courts of Appeals for the Second, Fourth, Fifth, Eighth, Ninth, and Tenth Circuits, which hold that a party must strictly comply with the service requirements under Rule 11(c)(1)(A) before sanctions may be imposed by the court. The Court is now presented with the opportunity to clarify this conflict among the Circuit Courts, reverse the Fifth Circuit's decision to adopt a strict compliance standard, and establish a "substantial compliance" exception to Rule 11(c)(1)(A) which upholds the spirit and purpose of Rule 11.

REASONS FOR GRANTING THE PETITION

There is a disagreement among the Circuit Courts of Appeals as to whether a party must strictly or substantially comply with the procedural requirements under Rule 11(c)(1)(A).

The Seventh Circuit Court of Appeals in *Nisenbaum v. Milwaukee County*, 333 F.3d 804 (7th Cir. 2003) has held that a "letter" or "demand" which "complied substantially" with Rule 11(c)(1)(A), effectively invoked Rule 11 and entitled the moving party "to a decision on the merits of their request for sanctions under Rule 11." *Id.* at 808. *Accord Barker v. Bank One, Lexington, N.A.*, No. 97-5787, 1998 WL 466437 (6th Cir. July 30, 1998)(unpublished).

In contrast, the Ninth Circuit Court of Appeals has rejected the position that service of anything other than a motion will constitute sufficient compliance with the procedural requirements under Rule 11(c)(1)(A). *See Barber v. Miller*, 146 F.3d 707, 710 (9th Cir. 1998).

In affirming the District Court's ruling below, the Fifth Circuit Court of Appeals in this case confirmed its decision, as expressed in *Elliott v. Tilton*, 64 F.3d 213, 215 (5th Cir. 1995), that a party must strictly comply with the service requirements of Rule 11(c)(1)(A) in order to obtain sanctions against an offending party or attorney. Other Circuit Courts of Appeals have similarly held that strict compliance with the procedural requirements under Rule 11(c)(1)(A) is mandatory before a sanctions motion may be filed and presented to the court. *See e.g., Roth v. Green*, 466 F.3d 1179 (10th Cir. 2006), *cert. denied*, 128 S.Ct. 69 (2007); *Gordon v. Unifund CCR Partners*, 345 F.3d 1028 (8th Cir. 2003); *Brickwood Contractors, Inc. v. Datanet Engineering, Inc.*, 369 F.3d 385 (4th Cir. 2004); *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1328 (2nd Cir. 1995).

A. Rule 11 and the "Safe Harbor" Provision.

Rule 11 was promulgated for purposes of providing a check on abuses in signing and filing pleadings. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). In 1983, this Court amended Rule 11 to reduce the reluctance to impose sanctions "by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions." FED. R. CIV. P. 11 (Advisory Comm. Notes). Rule 11 was substantially amended again in 1993 to remedy what the Judicial Conference and this Court deemed were problems in the interpretation and application of the 1983 amendments to the Rule. Rule 11 was amended in 1993 to expand the scope of an attorney's obligation but constrained the imposition of sanctions in order to reduce the number of motions for sanctions being filed with the court. FED. R. CIV. P. 11 (Advisory Comm. Notes).

The "safe harbor" provision to Rule 11, provides:

> **(c) Sanctions.**
> If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
> (1) *How Initiated.*
> (A) By Motion.

> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses, including attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

FED. R. CIV. P. 11(c)(1)(A) (2007).

B. The Fifth Circuit Court of Appeals' decision in this case is in conflict with decisions in the Sixth and Seventh Circuit Courts of Appeals.

There is clearly disagreement among the Circuit Courts of Appeals on whether service of a "letter" or other demand, rather than a motion, to counsel more than twenty-one (21) days prior to the filing of a motion seeking sanctions "complies substantially" with the service requirements under Rule 11(c)(1)(A).

The Fifth Circuit Court of Appeals, as well as other Circuit Courts of Appeals, have held that a party must strictly comply with the procedural requirements under Rule 11(c)(1)(A) before the party may present the motion for imposition of sanctions. *See Barber v. Miller*, 146 F.3d 707 (9th Cir 1998); *Elliott v. Tilton*, 64 F.3d 213, 215 (5th Cir. 1995); *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1328 (2nd Cir. 1995). Of these decisions, only *Barber* involved the situation where service of a letter or other informal demand, rather than a motion, was made on opposing counsel.

In contrast, the Seventh Circuit Court of Appeals in *Nisenbaum v. Milwaukee County*, 333 F.3d 804 (7th Cir. 2003), and the Sixth Circuit Court of Appeals in *Barker v. Bank One, Lexington, N.A.*, No. 97-5787, 1998 WL 466437 (6th Cir., July 30, 1998) (unpublished), have held that such a "letter" or "demand" can constitute substantial compliance with the procedural requirements of Rule 11(c)(1)(A).

In *Barber*, *supra*, the Ninth Circuit Court of Appeals held that strict compliance with Rule 11(c)(1)(A)'s procedural requirements was mandatory. In that case, an attorney had filed a complaint on behalf of his client, Pamela Barber, against Imageware Software, Inc., *et al.* alleging numerous state claims including two federal patent infringement and RICO violation claims. *Barber*, 146 F.3d at 709. At the time the complaint was filed, Barber did not own the patent in question. After Barber's counsel, Miles Carlsen ("**Carlsen**"), refused to discuss by telephone the merits of the case with Imageware's counsel, Imageware's counsel sent a letter to Carlsen requesting he dismiss the complaint with prejudice on the basis that there

was no federal jurisdiction and a release between Barber and Imageware barred most of her claims. *Id.* The letter further added:

> Please allow this letter to serve as formal notice pursuant to Federal Rule of Civil Procedure 11(c) that, unless the Complaint is dismissed with prejudice forthwith, my clients reserve the right to seek appropriate sanctions, including all fees and costs incurred in defending this matter.

Id. at 709. Carlsen responded by letter demanding that Imageware "stop threatening sanctions." Imageware replied that it intended to seek Rule 11 sanctions. *Id.*

On December 19, 1995, Imageware sent another letter to Carlsen informing him that it would seek sanctions after the district court dismissed the Complaint and retained jurisdiction to consider sanctions. One month later, Imageware filed and served Carlsen with a motion for sanctions. *Id.*

On April 8, 1996, the district court awarded Imageware $2,500 in sanctions against Carlsen. Carlsen appealed the award and Imageware cross-appealed the amount of the award and the denial of its request for further sanctions under 28 U.S.C. § 1927 and the court's "inherent authority." *Id.*

Although the district court observed that Carlsen was provided with multiple warnings that sanctions would be sought, the Ninth Circuit Court of Appeals found that the warnings were not motions, "and the Rule requires service of a motion." *Id.* at 710. Citing the Advisory Committee Notes, the court stated

that to permit an informal warning to substitute for service of a motion would eliminate both the language and purpose of the "safe harbor" provision:

> To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

FED. R. CIV. P. 11 (Advisory Comm. Notes). Accordingly, the Ninth Circuit Court of Appeals reversed the district court's award of sanctions in favor of Imageware.

Since deciding *Barber*, the Ninth Circuit Court of Appeals confirmed its decision requiring strict compliance with the procedural provisions under Rule 11(c)(1)(A). *See Radcliffe v. Rainbow Construction Co.*, 254 F.3d 772 (9th Cir. 2001) (reversing district court's decision to award sanctions since motion for sanctions was served on opposing counsel the same day the motion for sanctions was filed with the district court and rejecting district court's finding that party seeking sanctions had met service and notice requirements under Rule 11(c)(1)(A) because motion had been on file for more than 21 days, thus providing enough notice and time for opposing party to withdraw challenged pleading); *but see United States ex rel. Eitel v. Reagan*, 35 F.Supp.2d 1151 (D. Ariz. 1998) (district court held

that letter notifying opposing counsel of alleged violations was sufficient notice even though motion for sanctions was not served on the government defendant as required under Rule 11(c)(1)(A)).[1]

Several other Circuit Courts of Appeals, including the Fifth Circuit Court of Appeals, have reached their own conclusion that parties must strictly comply with the procedural service and notice requirements under Rule 11(c)(1)(A) in accordance with the Ninth Circuit Court of Appeals' decision in *Barber v. Miller*. Most have directly or impliedly rejected the notion that a "letter" or "demand" is sufficient under the express language of Rule 11(c)(1)(A).

For example, the Eighth Circuit Court of Appeals in *Gordon v. Unifund CCR Partners*, 345 F.3d 1028 (8th Cir. 2003), reversed the district court's imposition of sanctions on appellant one year after it found that there was no valid basis for appellant to file a motion for default judgment when appellant had received file-stamped copies of Unifund's answer. The Eighth Circuit Court of Appeals refused to recognize that Unifund's emails to appellant warning him that if the motion for default judgment was not withdrawn that it would seek Rule 11 sanctions was sufficient notice under the safe-harbor provisions. *Id.* at 1029. The appellate court reasoned that Unifund's failure to request Rule 11 sanctions in a separate motion as well as its failure to prepare and serve a Rule 11 motion on

---

[1] Although *United States ex rel. Eitel v. Reagan*, 35 F.Supp.2d 1151 (D. Ariz. 1998), was not determined by the Ninth Circuit Court of Appeals, the district court issued its opinion in this case in December 1998, months after the Ninth Circuit Court of Appeals issued its decision in *Barber v. Miller*, 146 F.3d 707 (9th Cir. 1998).

appellant prior to filing the Rule 11 motion with the district court was a procedural deficiency under Rule 11(c)(1)(A). *Id.* at 1030.

The Tenth Circuit Court of Appeals has also adopted a strict compliance standard requiring notice and service by motion under Rule 11(c)(1)(A). In *Roth v. Green*, 466 F.3d 1179 (10th Cir. 2006), *cert. denied*, 128 S.Ct. 69 (2007), Roth and Gumeson filed a suit under 28 U.S.C. § 1983 against various state and county officials, several municipalities and a number of other "unknown" defendants for allegedly creating and executing an unconstitutional drug checkpoint which resulted in Roth and Gumeson being unlawfully stopped, searched and arrested. The district court granted the defendants' motion to dismiss the entire case. Defendants then filed motions for sanctions against Robert Mulhern ("**Mulhern**"), Roth and Gumeson's counsel, under 28 U.S.C. § 1927 and Rule 11. Mulhern contested the motion for sanctions asserting that Rule 11 sanctions was inappropriate because he had not been properly served with copies of defendants' motion at least twenty-one days prior to the motion being filed with the court. The district court granted the motion for sanctions and awarded defendants' fees and costs because, among other reasons, the district court found that the defendants' letters to Mulhern had satisfied Rule 11's safe-harbor procedural notice and service requirements. *Id.* at 1185-86. The Tenth Circuit Court of Appeals reversed reasoning that the express language of Rule 11(c)(1)(A) required service of the actual motion on Mulhern. Rejecting the Seventh Circuit Court of Appeals decision in *Nisenbaum*, *supra*, the Tenth Circuit Court of Appeals held that "the Advisory Committee Notes clearly 'suggest' that

warning letters, such as those sent by defendants to Mulhern, are supplemental to, and cannot be deemed an adequate substitute for, the service of the motion itself." *Id.* at 1192-93.

Similarly, although not confronted with the factual situation where letters were sent as a substitute for service of the actual motion, other Circuit Courts of Appeals, including the Fifth Circuit Court of Appeals, have agreed that strict compliance under Rule 11(c)(1)(A)'s procedural requirements is mandatory. The Fourth Circuit Court of Appeals in *Brickwood Contractors, Inc. v. Datanet Engineering, Inc.*, 369 F.3d 385 (4th Cir. 2004), stated that failure to satisfy the conditions of service and notice under the Rule precluded the imposition of sanctions. "It is clear from the language of the rule that it imposes mandatory obligations upon the party seeking sanctions.... [i]n addition, the rule serves to limit the power of the district court to impose sanctions under the rule, by expressly conditioning the court's authority to impose sanctions upon compliance with the safe-harbor provisions." *Id.* at 389. Notably, the *Brickwood Contractors, Inc.* opinion did not involve the factual situation where the party seeking sanctions notified opposing counsel of its intention to seek sanctions by letter prior to serving and filing a Rule 11 motion. Nonetheless, the Fourth Circuit Court of Appeals, sitting *en banc* upon rehearing, affirmed their prior panel's decision to reverse the district court's imposition of sanctions because defendants failed to serve Brickwood with their Rule 11 motion before filing it with the district court. *Id.* at 390. *Accord Ridder v. City of Springfield*, 109 F.3d 288, 296 (6th Cir. 1997) ("The plain language of Rule 11 specifies that unless a

movant has complied with the twenty-one day 'safe harbor' service, the motion for sanctions 'shall not be filed with or presented to the court.' Springfield did not comply with the 'safe harbor' procedural prerequisite; therefore, the City's Rule 11 motion should not have been presented to the court.")(internal citations omitted); *Elliott v. Tilton*, 64 f.3d 213, 216 (5th Cir. 1995) ("In the present case, the record indicates that plaintiffs did not serve their motion for sanctions on the defendants and defense counsel prior to filing. The 'safe harbor' provision added to Rule 11 contemplates such service to give the parties at whom the motion is directed an opportunity to withdraw or correct the offending contention. The plain language of the rule indicates that this notice and opportunity prior to filing is mandatory."); *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1328 (2d Cir. 1995)("In imposing sanctions, the district court apparently did not take into account YRC's failure to comply with the revised procedural requirements of Rule 11.... there is no evidence in the record indicating that YRC served Hadges with the request for sanctions 21 days before presenting it to the court. Thus, YRC denied Hadges the 'safe-harbor' period that the current version of the Rule specifically mandates.")(internal citations omitted). These cases demonstrate that the majority of the Circuit Courts of Appeals have directly or impliedly rejected the notion that a letter is sufficient to comply with the procedural requirements under Rule 11(c)(1)(A) by adopting a strict compliance interpretation of the safe-harbor provision.

C. Substantial compliance with the technical requirements under the "safe-harbor" provision of Rule 11(c)(1)(A) should be a sufficient pre-condition to imposition of sanctions under Rule 11.

The strict compliance standard expressed in the foregoing decisions is inconsistent with the Seventh Circuit Court of Appeals' decision in *Nisenbaum v. Milwaukee County*, as well as the Sixth Circuit Court of Appeals' unpublished decision in *Barker v. Bank One, Lexington, N.A.*, where letters demanding withdrawal of offensive pleading were deemed to constitute substantial compliance with the "safe harbor" provision of Rule 11(c)(1)(A).

In *Nisenbaum, supra*, Nisenbaum, an employee of Milwaukee County's Department of Public Safety, filed suit against a number of individuals after losing his job as a security supervisor. *Nisenbaum*, 333 F.3d at 806. He alleged the defendants did not approve of his run for public office as County Clerk. *Id.* Summary judgment was granted in favor of all defendants except for one where the case went to trial. *Id.* Following entry of judgment, Defendants moved the district court to impose sanctions against Nisenbaum for frivolous litigation under Rule 11 and other statutes. *Id.* The magistrate judge denied the Rule 11 motion stating that defendants had failed to comply with Rule 11(c)(1)(A), but noted that any non-compliance was merely technical. *Id.* at 808. On appeal, the Seventh Circuit Court of Appeals reversed. The court recognized that Rule 11(c)(1)(A) requires that a motion for sanctions "may not be filed with the court until the opposing party has had three weeks to decide whether

to withdraw the supposedly offending pleading." *Id.* However, the record indicated that defendants sent Nisenbaum's counsel a "letter" or "demand," rather than a "motion," which clearly warned Nisenbaum of the problem more than twenty-one days before the motion was filed. *Id.* Nevertheless, Nisenbaum decided to press his lawsuit. *Id.* The Seventh Circuit Court of Appeals held that defendants had "complied substantially with Rule 11(c)(1)(A)" and went on to affirm the district court's imposition of sanctions against Nisenbaum. *Id.*

Further, in *Barker, supra,* albeit an unpublished decision, the Sixth Circuit Court of Appeals concurred that warning letters sent to counsel complied with the "safe-harbor" provisions of Rule 11(c)(1)(A). *Barker,* 156 F.3d at *1. Barker filed suit against over forty defendants alleging they had conspired to deprive him of his inheritance under a will. *Id.* William Lloyd Turner ("**Turner**") appeared as counsel for Barker when the case was transferred to the Eastern District of Kentucky. *Id.* Defense counsel wrote several letters to Turner warning him "in no uncertain terms" that they would seek sanctions because the action was frivolous. *Id.* No response was received from Turner. *Id.* On September 28, 1995, the district court dismissed the complaint and entered final judgment on April 11, 1996. Id. at *2. Almost one month later, defense counsel served Turner with a Rule 11 motion, which was filed with the district court on the 22nd day after service of the motion. *Id.* The district court awarded sanctions against Barker and Turner.

The Sixth Circuit Court of Appeals affirmed that defendants had complied with the purpose of the safe-

harbor provision. *Id.* at *2. In doing so, the court distinguished the case from its decision in *Ridder*, *supra*, where it previously held that strict compliance with the procedural requirements under Rule 11(c)(1)(A) was a mandatory pre-condition to imposition of sanctions. *Id.* The court held that defense counsel's letters to Turner in April and June 1995 warned him in "no uncertain terms that they would be seeking sanctions due to the obvious frivolity of the case," and provided "more than sufficient time [for Turner] to attempt to convince his client [Barker] that voluntary dismissal was required, or to withdraw from representation." *Id.* It also recognized that the demands and a motion for sanctions had been served on Turner at least twenty-one days prior to it being filed with the district court. *Id.* The Sixth Circuit Court of Appeals concluded that, under these circumstances, "the purpose of the safe-harbor provision," which is to "allow a party or counsel to avoid sanctions by withdrawing the challenged claims or his representation," had been "complied with in this case by the warning letters Turner received." *Id.*, *citing Ridder, supra.*

Several lower courts in other jurisdictions have also reached the conclusion that a letter, which sufficiently warns opposing counsel of a Rule 11 violation as well as the party's intention to seek sanctions if the offending pleading is not withdrawn, may constitute substantial compliance with the technical procedural requirements under Rule 11(c)(1)(A). *See e.g.*, *In re M.A.S. Realty Corp.*, 326 B.R. 31 (Bankr. D. Mass. 2005); *In re Cochener*, 360 B.R. 542 (Bankr. S.D. Tex. 2007). Although the bankruptcy court in *M.A.S. Realty Corporation*, *supra*,

refused to adopt the standard that technical non-compliance with Rule 11(c)(1)(A) did not necessarily bar the imposition of sanctions based on the specific facts of the case, it left open the question if the letter at issue had been made a part of the record and contained unambiguous statements putting the parties on notice that Rule 11 sanctions would be sought such that the letter was the "equivalent of a motion," then it may have found technical non-compliance with the safe-harbor provision to have been a non-issue and affirmed the imposition of sanctions. *M.A.S. Realty Corp.*, 326 B.R. at 39-40. Similarly, in *Cochener, supra*, the bankruptcy court left open the question if the Trustee had sent a letter to Barry, debtor's counsel, in 2001 warning him that Rule 9011 sanctions would be sought unless the motion to dismiss was withdrawn and Barry continued to refuse to withdraw the motion to dismiss, then a motion for sanctions may have been appropriate because Barry would have had an opportunity to withdraw his motion to dismiss without fear of recourse from the court, although the bankruptcy court ultimately awarded sanctions to Trustee on other grounds than Rule 9011. *Cochener*, 360 B.R. at 569-70.

District Courts in the Second Circuit have similarly found letters to be sufficient to provide the requisite notice under Rule 11(c)(1)(A). *See e.g., Jeffreys v. Rossi*, 275 F.Supp.2d 463 (S.D. N.Y. 2003)(decided after *Hadges v. Yonkers Racing Corp.*, the district court found a letter to provide sufficient notice because the letter outlined an anticipated motion for sanctions and was sent more than 21 days before filing of a formal motion); *The Carlton Group, Ltd. v. Tobin*, No. 02-CV-5065-SAS, 2003 WL 21782650 (S.D. N.Y. July 31, 2003)(unpublished)(found that a letter

from plaintiff to defendant provided sufficient notice that Rule 11 sanctions would be sought and provided time for defendant to withdraw offending pleading); *Little v. Twentieth Century-Fox Films*, No. 89-CV-8526, 1996 WL 376971 (S.D. N.Y. July 5, 1996), *vacated on other grounds*, 111 F.3d 123 (2nd Cir. 1997)(unpublished)(found that a letter provided sufficient notice, although district court reserved ruling on whether letter complied with the Rule 11 safe-harbor provision); *but see, Carruthers v. Flaum*, 450 F.Supp.2d 288 (S.D. N.Y. 2006)(stated that Second Circuit follows standard of strict compliance with Rule 11's technical procedural requirements and rejected other Circuit Courts' cases which found that letter or demand was sufficient notice); *Lancaster v. Zufle*, 170 F.R.D. 7 (S.D. N.Y. 1996)(found that express language of Rule required service of formal motion and rejected letter because letter did not indicate that Rule 11 sanctions would be sought). *See also, United States ex rel. Eitel v. Reagan*, 35 F.Supp.2d 1151 (D. Ariz. 1998)(decided after *Barber v. Miller*, district court held that Eitel's letter notices of alleged Rule 11 violations provided sufficient notice even though motion was not formally served on government defendant as required under subdivision (c)(1)(A)).

The foregoing decisions illustrate not only the diversity of decisions among the Circuit Courts on the issue at bar but also an intention by the courts involved to recognize an exception to accomplish the spirit and purpose of Rule 11. The decisions which call for strict and mandatory compliance with the procedural requirements under Rule 11(c)(1)(A) fail to recognize the spirit and purpose behind Rule 11, *i.e.*, to allow a party or counsel to avoid sanctions by withdrawing the

challenged claim or pleading. The purpose of Rule 11 is not to permit a party or counsel to avoid sanctions by claiming technical non-compliance with the service requirements under the "safe-harbor" provision. The purpose and spirit of Rule 11 is fulfilled when sufficient notice of the alleged violation is provided and the threat of seeking sanctions is communicated to opposing counsel if the challenged pleading is not timely withdrawn. A demand or letter which provides in no uncertain terms the Rule 11 violation, a request to withdraw the challenged pleading, and the intent to seek sanctions accomplishes everything a motion would accomplish under the same circumstances.

Further, permitting "substantial compliance" to satisfy the "safe harbor" requirements of Rule 11(c)(1)(A) would be consistent with Justice Scalia's concerns expressed on passing the 1993 amendments to Rule 11, which included the addition of the "safe-harbor" provision:

> The proposed revision would render the Rule toothless, by allowing judges to dispense with sanction, by disfavoring compensation for litigation expenses, ***and by providing a 21-day "safe harbor" within which, if the party accused of a frivolous filing withdraws the filing, he is entitled to escape with no sanctions at all....***
>
> ***In my view, those who file frivolous suits and pleadings should have no "safe harbor." The Rules should be solicitous of the abused (the courts and the opposing party), and not of the abuser. Under the revised Rule, parties will be able to file***

> ***thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: If the objection is raised, they can retreat without penalty.***

146 F.R.D. 401, 507-08 (1993)(emphasis added).

Application of a strict interpretation of the "safe harbor" provision under Rule 11(c)(1)(A) simply permits conduct violating Rule 11 to go unpunished at the expense of losing the spirit and purpose of Rule 11. Such a result could not have been what was intended by the 1993 amendment to Rule 11.

D. Petitioner substantially complied with the purpose and spirit of Rule 11.

In the instant case, Petitioner's initial Motion to Strike/Sanctions, as well as its Supplement to Motion Strike/Sanctions, Second Motion for Sanctions, and the April 19 Letter were all served on Schiro and, other than the April 19 Letter, were filed with the District Court more than twenty-one (21) days prior to entry of the Sanctions Order. Schiro made no response and took no action to retract the offensive pleadings. Neither Respondent nor Schiro argued at any point prior to the filing of Petitioner's Second Motion for Sanctions that Petitioner had failed to comply with the service requirements of Rule 11(c)(1)(A). They also did not argue that they were not aware of the challenged pleadings Petitioner was requesting be withdrawn or that sanctions under Rule 11 were and would be sought by Petitioner.

Given the foregoing, Petitioner more than complied with the spirit and purpose of Rule 11. Notice was substantial and detailed. To hold that Petitioner's technical failure to serve the Second Motion for Sanctions twenty-one days prior to filing it alleviates Respondent and Schiro from a claim under Rule 11 defeats the purpose and spirit of Rule 11 and constitutes a grave injustice.

This Court should grant the instant petition to consider this matter further, determine that substantial compliance with the procedural requirements under Rule 11(c)(1)(A) is sufficient for a party to seek sanctions under Rule 11, and reverse the decision of the United States Court of Appeals for the Fifth Circuit.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,
Bruce W. Akerly
Counsel of Record
Linda D. Thai
BELL NUNNALLY & MARTIN LLP
3232 McKinney Avenue
Suite 1400
Dallas, Texas 75204
(214) 740-1430

Attorneys for Petitioner

No. 06-10468
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In The Matter Of: JACK E PRATT, JR,
Debtor

THE CADLE CO, as successor by purchase and assignment of the interests of Scott M. Seidel, Chapter 7 Trustee for the bankruptcy Estate of Jack E. Pratt, Jr.,
Appellant

v.

JACK E PRATT, SR,
Appellee

September 13, 2007, Filed

Appeal from the United States District Court for the Northern District of Texas USDC 3:03-CV-2273-N

JUDGES: Before KING, GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM: *

The Order of the district court granting sanctions, entered March 9, 2006, is affirmed for essentially the reasons given by the district court.

AFFIRMED.

Footnote

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Filed 3/8/2006
CIVIL ACTION NO. 3:03-CV-2273-N

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE CADLE COMPANY, Plaintiff,

v.

JACK E. PRATT, SR., Defendant.

ORDER

Before the Court are Defendant's motion for discovery sanctions [139], Defendant's supplemental motion for discovery sanctions [147], Plaintiff's motion for sanctions [141], Defendant's objection to and motion to strike Plaintiff's supplement [163], and Plaintiff's motion for review of Clerk's taxation of costs [152].

The Court retains jurisdiction to address those motions. *See Proctor & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 524 (5th Cir. 2002). Defendant's motion for discovery sanctions is based on a prior ruling of the Court that it would permit Plaintiff to proceed with certain specified depositions, but at the risk of sanctions "[i]f any of the deponents prove not to have knowledge of facts relevant to this action." *See* Order (January 31, 2005); FED. R. Civ. P. 26(c)(2) (court can order "that the ... discovery may be had only on specified terms and conditions"). Plaintiff proceeded to take the depositions. It appears to the Court that four of the deponents had no knowledge of facts relevant to this action. The

Court, therefore, grants the motion for sanctions in part, and awards Defendant sanctions from Plaintiff in the amount of $4,000, payable within 45 days of the date of this Order.

Defendant's supplemental motion for sanctions is denied, as it does not appear to raise issues within the ambit of Rule 37, and sanctions are not otherwise required here. Plaintiff's motion for sanctions is denied as Plaintiff failed to comply with the service requirement of Rule 11(c)(1)(A). Additionally, Defendant has adequately explained his change in position.

Defendant's objection to and motion to strike Plaintiff's supplement is denied as moot. Plaintiff's motion for review of Clerk's taxation of costs is granted in part.

The parties, by private agreement, agreed to share certain costs. The amount of costs taxed by the District Clerk is reduced by $1,566.82, in conformity with the parties' agreement.

Signed March 8, 2006.

Filed: 10/11/2007
No. 06-10468
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In The Matter Of: JACK E PRATT, JR,
Debtor

THE CADLE CO, as successor by purchase and assignment of the interests of Scott M. Seidel, Chapter 7 Trustee for the bankruptcy Estate of Jack E. Pratt, Jr.,
Appellant

v.

JACK E PRATT, SR,
Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING

Before KING, GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

Filed: 7/11/2005
CIVIL ACTION NO. 3:03-CV-2273-N

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE CADLE COMPANY, Plaintiff,

v.

JACK E. PRATT, SR., Defendant.

PLAINTIFF'S MOTION FOR SANCTIONS UNDER FEDERAL RULE OF CIVIL PROCEDURE 11, COMBINED WITH BRIEF IN SUPPORT THEREOF

Plaintiff THE CADLE COMPANY ("Cadle") files this Motion for Sanctions Under Federal Rule of Civil Procedure 11, Combined With Brief in Support Thereof against Defendant JACK E. PRATT, SR.'S ("Defendant") counsel, RICHARD B. SCHIRO ("Schiro"), as follows:

1. This action was originally filed on January 30, 2003 by the Chapter 7 Trustee in Jack E. Pratt, Jr.'s bankruptcy case, styled *In re Jack E. Pratt, Jr.*, Case No. 00-35214, in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division. The Chapter 7 Trustee later sold and assigned the action to Cadle for valuable consideration. The bankruptcy court approved the sale and assignment. Cadle was then substituted as the party-plaintiff in the action. Thereafter, this Court withdrew the reference of the

action and assigned its present civil action number.

2. The parties tried the action on June 6, 2005.

3. On April 14, 2005, Cadle filed a Motion to Strike Portions of Defendant's Motion for Summary Judgment, Prohibiting Defendant from Asserting New Defensive Theories, for Consideration of Sanctions, and Request for Emergency Hearing and Status Conference Regarding Same (the "Motion to Strike/Sanctions) (Dkt. No. 84) requesting the Court to not permit Defendant to assert his new theory that the offsets against Jack E. Pratt, Jr.'s ("Jack Jr.") distributions under his mother's will were loans made to Jack Jr. from her estate (the "New Theory"). The basis for Cadle's argument stemmed from Defendant originally asserting that the offsets against Jack Jr.'s distributions were for loans made by Jack Jr.'s mother to him prior to her death (the "Original Theory"). Defendant consistently asserted this Original Theory for over two years. See Supplemental Appendix in Support of Cadle's First Supplement to Motion to Strike/Sanctions (Dkt. No. 98 and 99). Only after the close of discovery in this action, did Defendant assert the New Theory for the first time. Cadle was never given an opportunity to conduct discovery on the New Theory.

4. The Original Theory was proclaimed and maintained in Defendant's pleadings filed with the Court, e.g. Defendant's Motion for Summary Judgment, Brief in Support of Defendant's Motion for Summary Judgment, and sworn affidavits of Defendant, his administrative assistant Evelyn Johnstone, and his

daughter Jill Pratt (collectively, the "Motion for Summary Judgment") (Dkt. No. 60). Schiro, Defendant's counsel, signed and filed these pleadings with the Court when he and his client knew or should have known through reasonable inquiry that the pleadings were false.

5. All of the documents relating to the administration of the estate of Crystal Pratt (as to which Defendant was the Executor and Trustee of his children's trusts created thereunder), including those which Defendant apparently believed supported his New Theory, have been uniquely and solely in the possession of Defendant since at least April 2, 1996, the date of Crystal Pratt's death. Defendant created these documents all directly and/or through his administrative assistant, Ms. Johnstone. These documents were in the possession of Defendant's counsel prior to February 12, 2005, the date on or about which they were produced for the first time in this action to Cadle's counsel. These documents are not voluminous - comprising two 2" three-ring binders and an approximately 1" loose collection of documents. Schiro indicated that he had reviewed these documents before they were produced.

6. In connection with the Motion to Strike/Sanctions, Cadle requested the Court sanction Defendant for making false statements in affidavits, deposition transcripts, and trial transcript, and sanction Schiro under Federal Rule of Civil Procedure 11 for filing false pleadings - particularly, Defendant's Motion for Summary Judgment (Dkt. No. 60) -- with this Court. On May 3, 2005, Cadle supplemented its Motion to Strike/Sanctions to include a summary of all of

Defendant's lies contained in his affidavits, deposition transcripts and trial transcript as well as the Motion for Summary Judgment and Brief and Appendix in support thereof (Dkt. No. 98).

7. On April 18, 2005, Schiro fled a Motion for Leave to File Supplemental Brief in Support of Defendant's Motion for Summary Judgment (the "Motion to Supplement") and attached to the Motion to Supplement a new brief and new affidavits from Defendant, his administrative assistant, Evelyn Johnstone, and his daughter, Jill Pratt, asserting the New Theory. (Dkt. No. 89). Neither the Motion to Supplement, the new brief attached thereto, nor the new affidavits attached thereto specifically retract the earlier pleadings.[1]

8. On April 19, 2005, after Cadle had filed its Motion to Strike/Sanctions, Cadle sent a letter to Schiro, by facsimile and first class mail, requesting that he withdraw Defendant's Motion for Summary Judgment because it contained statements relating to Defendant's Original Theory, which Schiro knew or should have known were untrue (the "Letter"). A true and correct copy of the Letter is attached as Exhibit "1" and is incorporated by reference herein as if fully set forth.

9. Schiro refused and/or has failed to withdraw Defendant's Motion for Summary Judgment or respond to Cadle's Letter. Schiro has never notified this Court that his pleadings previously filed present a clearly false argument.

10. At the trial of this action on June 6, 2005,

the Court denied Defendant's Motion for Summary Judgment and his Motion to Supplement, denied Cadle's request to prohibit Defendant from asserting his New Theory and reserved ruling on Cadle's request for Sanctions against Defendant and Schiro.

11. Pursuant to Rule 11 under the Federal Rules of Civil Procedure, Cadle was required to give Schiro twenty-one (21) days notice to withdraw the false pleadings. FED. R. Civ. P. 11. Since the Letter was sent to Schiro after Cadle filed its Motion to Strike/Sanctions, Cadle files this Motion to cure any notice defect.

12. Rule 11 provides, in pertinent part, that by signing and filing a pleading with the Court:

> an attorney... is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances
>
> > (1) it is not being presented for an improper purpose, such as to... cause... needless increase in the cost of litigation;
> >
> > ***
> >
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> >
> > (4) the denials of factual contentions are warranted on the evidence or, if

> specifically so identified, are reasonably based on a lack of information or belief.

FED. R. Civ. P.11. Defendant asserts in his Motion for Summary Judgment that the offsets were loans that Jack Jr. owed to his mother before her death. *See* Defendant's Motion for Summary Judgment (Dkt. No. 60). At the time of the filing of Defendant's Motion for Summary Judgment, Schiro had access to and possession of the documents relating to the administration of the estate of Crystal Pratt.

Therefore, Schiro knew or should have known from the estate documents that there was no evidence to support the Defendant's theory that the offsets were loans made to Jack Jr. by his mother prior to her death. But yet, Schiro signed and filed pleadings with the Court asserting this very theory.

13. Even after Cadle's counsel notified Schiro that the Original Theory was false and requested that Schiro withdraw Defendant's Motion for Summary Judgment, Schiro refused - a clear violation of Rule 11. In fact, during the trial of the action, the defense continued to assert both the Original Theory as well as the New Theory.

14. Cadle has undertaken considerable discovery (over 10 depositions) in this action, retained expert witnesses (Honorable Joseph Ashmore, Jr.- ret. and Quentin L. Mimms, C.P.A.), and expended countless hours of attorney and paralegal time and expense in an effort to address, investigate and defend against Defendant's Original Theory, including responding to Defendant's Motion for Summary

Judgment and Motion to Supplement.

WHEREFORE, Cadle respectfully requests that the Court find Schiro in violation of Federal Rule of Civil Procedure 11, award Cadle a sum of money sufficient to permit it to recover all of its attorneys' fees and costs in having to develop evidence to refute Defendant's Original Theory and respond to pleadings asserting this false theory, such amount to be determined, if necessary, by affidavit or testimony to be provided to the Court at a subsequent time or hearing, and for such other and further relief, in law and in equity, this Court deems just and proper.

Dated: July 11, 2005.

Respectfully submitted,
BELL NUNNALLY & MARTIN LLP
Bruce W. Akerly
State Bar No. 00953244 Linda D. Thai
State Bar No. 24042024
1400 One McKinney Plaza
3232 McKinney Avenue
Dallas, Texas 75204-2429
(214) 7401430 Telephone
(214) 740-1421 Facsimile
ATTORNEYS FOR PLAINTIFF THE CADLE COMPANY

Footnote

[1]Even during the trial, Defendant admitted that he did not fulfill Crystal Pratt's alleged wishes that her children be "equalized" by offsetting loans made prior to her death to her children against their distributions

from her estate.

Exhibit 1

April 19, 2005

Via Facsimile and First Class Mail
Richard B. Schiro, Esq.

Law Offices of Richard B. Schiro
3 710 Rawlins Street,
Suite 1350
Dallas, Texas 75219-4284

Re: Civil Action No. 3:03-CV-2273-N;
The Cade Company v. Jack E. Pratt, Sr.

Dear Dick:

I am writing this letter to you pursuant to Rule 11 (c)(1)(A) of the Federal Rules of Civil Procedure.

Cadle demands that you withdraw all pleadings signed by you in this action in which you allege the "equalization" of debt theory, as well as all false affidavits and deposition testimony presented in support of this theory. It is clear that you knew or should have known, and now clearly know, that the pleading is incorrect and the affidavits submitted in support of the pleading are false. This is clear from the deposition on April 12, 2005, by Ms. Johnstone that her affidavit submitted in support of Defendant's Motion for Summary Judgment was false, Defendant's response to Cadle's Motion for Summary Judgment (which you signed) which asserts that the payments made to Jack Pratt Jr. were not offsets made against pre-death "loans" but rather "loans" made by the estate

and repaid from the distribution from the estate against what he was supposed to receive under the Will (allegedly via his CAP Trust). This is now the position taken in Defendant's Motion to Supplement and the new affidavits of Jack Pratt Sr., Evelyn Johnstone and Jill Pratt submitted in support thereof. I would have thought that, given Ms. Johnstone's about-face testimony that you would have withdrawn Defendant's Motion for Summary Judgment. Instead, you simply seek to supplement it and the affidavits, false testimony and false argument remain before the Court. This is not sufficient.

If the pleadings, affidavits and other evidence on which they rely are not withdrawn from the Court immediately, Cadle will file a motion for sanctions directly against you. Again, my practice is to try not to do such things without first giving attorneys a chance to correct clear errors of judgment, but I have to agree that in this situation I am troubled that the position changed so late in the game. I can only conclude that you must have been aware of the inaccuracy of Pratt Sr.'s position since you were in possession of the estate documents well before they were produced to Cadle.

Should you have any questions regarding these documents, please contact me.

Very truly yours,

BELL NUNNALLY & MARTIN LLP
Bruce W. Akerly

Filed 5/3/2005
CIVIL ACTION NO. 3:03-CV-2273-N

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE CADLE COMPANY, Plaintiff,

v.

JACK E. PRATT, SR., Defendant.

PLAINTIFF'S FIRST SUPPLEMENT TO MOTION TO STRIKE PORTIONS OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, PROHIBITING DEFENDANT FROM ASSERTING NEW DEFENSIVE THEORIES, FOR CONSIDERATION OF SANCTIONS, AND REQUEST FOR EMERGENCY HEARING AND STATUS CONFERENCE REGARDING SAME

Plaintiff THE CADLE COMPANY ("Cadle") files this First Supplement to Motion to Strike Portions of Defendant JACK E. PRATT's ("Defendant") Motion for Summary Judgment, Prohibit Defendant From Asserting New Defensive Theories, for Consideration of Sanctions, and Request for Emergency Hearing and Status Conference Regarding Same ("Motion to Strike/Sanctions"), as follows:

1. The Motion to Strike/Sanctions was filed April 14, 2005 (Doc. No. 84), following the deposition of Evelyn Johnstone's ("Johnstone")

deposition on April 12, 2005, in which she revealed that her affidavit in support of Defendant's Motion for Summary Judgment and sworn testimony in depositions over the past several years had been false. Johnstone was Defendant's administrative assistant for years and assisted him in carrying out his duties as Executor under his ex-wife's Will.

2. Accompanying this Supplement is a Supplemental Appendix ("Supp. App.") in which Cadle sets forth examples of Defendant's steadfast and repeated maintenance that his son, Jack E. Pratt Jr. ("Pratt Jr.") did not receive a distribution from his mother Crystal A. Pratt's ("CA Pratt") estate because Defendant offset amounts which Defendant maintained were owing by Pratt Jr. to his mother before her death. The appendix includes, without limitation, a summary of deposition and trial testimony where this position is espoused (Supp. App. 1-7), excerpts from deposition and trial testimony detailed in the summary (Supp. App. 1651, 59-83, 87-108), affidavits filed by Defendant, Johnstone, and Jill Pratt (Pratt Jr.'s sister) in support of Defendant's Motion for Summary Judgment (Supp. App. 8-15, 52-58, 84-86), and the affidavits (not amended or supplemental affidavits) in which Defendant, Johnstone and Jill Pratt changed their story regarding the offsets against distributions based on pre-death loans by CA Pratt to Pratt Jr. (Supp. App. 200-02, 267-69, 271-72).

3. On April 18, 2005, almost a week after Johnstone indicated her earlier deposition and affidavit testimony was a lie, Defendant filed his Motion and Brief in Support for Leave to File Supplemental Brief and Supplemental Appendix in Support of Motion for

Summary Judgment. ("Motion to Supplement") (Doc. No. 89).[1] Attached to the Motion to Supplement [sic] are affidavits - not denominated as amended or supplemental affidavits - of Johnstone, Jill Pratt and Defendant. *(See Supp. App. 200-02, 267-69, 271-72).* The Motion to Supplement does not seek to amend the trial or affidavit testimony of Johnstone, Jill Pratt, John Pratt (Jack Jr.'s brother) or Defendant. Nor does it seek to withdraw any pleadings or discovery responses which aver the "equalization" of pre-death debt theory, even though it clearly was and is a lie. Why?

Because Defendant knows that if he does, he would have to admit that the theory was a huge fabrication.

4. Based on the foregoing, as well as the argument contained in Cadle's Motion to Strike/Sanctions, Defendant's "equalization" of debt theory, maintained by Defendant for over 2 years and prior to the inception of this action, is and always was a sham. The sham was perpetuated and promoted by the lies of Defendant, his administrative assistant, and Pratt Jr.'s brother and sister, through their sworn testimony in depositions and affidavits filed with the Court. The false position has clearly cost Cadle in attorneys' fees and expense in having to refute and defend against that position. This included retaining and obtaining the opinions of expert witnesses, discovery, research, and other actions taken by Cadle's counsel. *(See e.g.,* Supp. App. 275329 - Cadle's expert reports which are clearly based, in substantial part, on Defendant's false position). Defendant's counsel asserted the sham "equalization" of debt theory in pleadings filed with the Court when he and they clearly knew or should have known through reasonable inquiry

that the position was false. Unfortunately, the sham theory was hidden from Cadle until just this week. Defendant should not be permitted to use the new theory to support his defensive position in this action and benefit from his misconduct. The Court should also look closely at whether and to what extent counsel for Defendant should be sanctioned under Rule 11. Fed. R. Civ. P. 11. Demand has been made on counsel for Defendant to withdraw all pleadings that set forth the false position. *(See Supp. App. 330-32).* Defendant should not be permitted to present an alternative theory at trial as to why he failed to distribute money under CA Pratt's Will to Pratt Jr., Defendant's Motion (as it relates to Cadle's breach of fiduciary duty claims) should be stricken, Defendant (and, if necessary, his counsel) should be ordered to reimburse Cadle for its fees and expenses incurred in having to respond to and refute Defendant's known sham position. Cadle requests such other and further relief to which it may be entitled under the circumstances.

Dated: May 3, 2005.

Respectfully submitted,
BELL NUNNALLY & MARTIN LLP
Bruce W. Akerly
State Bar No. 00953244 Linda D. Thai
State Bar No. 24042024
1400 One McKinney Plaza
3232 McKinney Avenue
Dallas, Texas 75204-2429
(214) 7401430 Telephone
(214) 740-1421 Facsimile
ATTORNEYS FOR PLAINTIFF THE CADLE COMPANY

Footnote

[1]Simultaneously herewith, Cadle is filing its response to the Motion to Supplement, which response is incorporated herein by reference as if fully set forth.

Filed 4/14/05
CIVIL ACTION NO. 3:03-CV-2273-N

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE CADLE COMPANY, Plaintiff,

v.

JACK E. PRATT, SR., Defendant.

PLAINTIFF'S MOTION TO STRIKE PORTIONS OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, PROHIBITING DEFENDANT FROM ASSERTING NEW DEFENSIVE THEORIES, FOR CONSIDERATION OF SANCTIONS, AND REQUEST FOR EMERGENCY HEARING AND STATUS CONFERENCE REGARDING SAME

Plaintiff THE CADLE COMPANY ("Cadle") files this Motion to Strike Portions of Defendant's Motion for Summary Judgment, Prohibit Defendant From Asserting New Defensive Theories, for Consideration of Sanctions, and Request for Emergency Hearing and Status Conference Regarding Same, as follows:

Background

1. Cadle is the assignee of Scott Seidel, chapter 7 trustee of the bankruptcy estate of Jack E. Pratt, Jr. ("Pratt Jr.") in that certain proceeding pending before the United States Bankruptcy Court for the Northern District of Texas, styled In re Jack E.

Pratt, Jr., Debtor, and referenced Case No. 00-3 5214-SAF-7.

2. In this action, Cadle asserts two (2) state law causes of action against Defendant JACK E. PRATT, SR. ("Defendant"), the father of Pratt Jr.: (1) to avoid a transfer by Pratt Jr. to Defendant of Pratt Jr.'s valuable interest in C.A. Pratt Partners, Ltd. in exchange for a release of alleged debt owing by Pratt Jr. to Defendant, pursuant to the Texas Uniform Fraudulent Conveyance Act and (2) for breach of fiduciary duties owing by Defendant to Pratt Jr. under and pursuant to the Will of Crystal A. Pratt (Defendant's ex-wife) through and under which Defendant acted as both Executor and Trustee of a trust created in favor of Pratt Jr.

3. This action has been pending for over two years. Trial is set for the week of June 6, 2005. Discovery closed on March 15, 2005 (by agreement of counsel and except for the depositions of Defendant and his executive assistant which were scheduled to be completed on April 6 and 12, respectively). Defendant is represented in the action by Richard B. Schiro, Texas Bar No. 17750600 and Jay Vogelson, Texas Bar No. 20603000. Both counsel have signed all pleadings filed by Defendant in this action, including Defendant's Motion for Summary Judgment.

4. Cadle alleges, among other things, that Pratt Jr. did not receive his full and proper distribution under his mother's will and that Defendant's failure to do so constituted a breach of his fiduciary duties owing as both executor and trustee, which themselves conflict. More specifically, one of Cadle's contentions is that

Pratt Jr. did not get a distribution under his mother's will when he should have received such a distribution. In response to this position, Defendant has steadfastly and repeatedly maintained that Pratt Jr. has not received any distribution because Defendant offset against such distribution amounts which Defendant maintains were owing by Pratt Jr. to his mother before her death. No other position to explain the lack of distributions has been put forth by Defendant to date. This theory has been proclaimed and maintained in pleadings filed with the Court (see e.g., Defendant's Motion for Summary Judgment ("Defendant's Motion") (Docket No. 60) (App. 1-3),[1] Brief in Support of Defendant's Motion for Summary Judgment ("Defendant's Brief") (Docket No. 60) (App. 451), and in the sworn affidavit testimony of Defendant, Evelyn Johnstone (his administrative assistant), and Jill Pratt (Pratt Jr.'s sister) (See Appendix to Defendant's Motion for Summary Judgment; App. 52-69) (Docket No. 60). This position is also adamantly taken in deposition testimony of Defendant, Ms. Johnstone, Jill Pratt, and John Pratt (Pratt Jr.'s brother).[2] Cadle directed discovery to Defendant to obtain information pertaining to this position. (See e.g., App. 70-124). All of these witnesses have testified clearly and unequivocally under oath and Defendant has verified interrogatory answers in which he states, without reservation or condition whatsoever, that the reason Jack Jr. did not get any distribution under his mother's Will was because his mother always wanted the debts owing by each of her children at the time of her death offset (they use the term "equalized") against any distributions they may have been entitled to under her Will (even though the Will provides no authority for the Executor - Defendant - to do so). Further, in connection with the

final distribution from the estate undertaken on or about June 17, 1999, Defendant even created a chart which shows what he and others testified represents the "offset" of amounts owing by Pratt Jr. to his mother at the time of her death against his prospective distribution under the Will, leaving Pratt Jr. to receive no cash distribution under the will. (App. 125-26).

5. On April 6, 2003, at the continuation of his oral deposition, Defendant affirmed his affidavit in support of Defendant's Motion in which he testifies, under oath, that the reason Pratt Jr. did not receive any distributions under the Will is because he offset "loans" owing by Pratt Jr. to his mother at the time of her death.

6. At the continuation of her deposition, taken April 12, 2005, Ms. Johnstone the administrative assistant to Defendant who assisted him with the administration of the estate of Crystal Pratt (but she is clearly not the Executor or the Trustee of Pratt-Jr.'s trust created under the Will), stated that the testimony in her affidavit given in support of Defendant's Motion was untrue and now, for the first time ever, she was maintaining that Jack Jr. actually received distributions under his mother's Will in the form of "advances" against distributions and not a setoff against "loans" made by Crystal Pratt to Pratt Jr. prior to her death. In other words, she (and by inference Defendant and Jill Pratt) admits that she lied in her affidavit and in prior deposition testimony, committed perjury, and that Defendant is now, through her testimony on April 12, 2005, at least, taking a completely new position with respect to the matter of why Pratt Jr. did not receive any distribution under his mother's Will.

7. As of the filing of this Motion, neither Defendant, Ms. Johnstone, Jill Pratt, nor John Pratt have retracted their pleadings, affidavits, discovery responses, and/or deposition testimony with respect to the "equalization" of debt theory, even though it is all a lie.

8. It is important to understand that all of the documents relating to the administration of the estate of Crystal Pratt (as to which Defendant was the Executor and Trustee of his children's trusts created thereunder), including those which Defendant apparently believes will support his new theory, have been uniquely and solely in the possession of Defendant since at least April 2, 1996, the date of Crystal Pratt's death. They were all created by Defendant directly and/or through his administrative assistant, Ms. Johnstone. These documents were presumably in the possession of Defendant's counsel prior to February 12, 2005, the date on or about which they were produced for the first time in this action to Cadle's counsel. These documents are not voluminous - comprising two two-inch three ring binders and an approximately 1" loose collection of documents. Counsel for Defendant indicated that he had reviewed these documents before they were produced. Ms. Johnstone claims that the documents which support the new defensive theory are contained in these documents. (See App. 127) Defendant did not assert this new defensive theory prior to April 12, 2005.

9. Cadle has undertaken considerable discovery (over 10 depositions) in this action, retained an expert witness (Honorable Joseph Ashmore, Jr.-ret.), and expended countless hours of attorney and

paralegal time and expense, which clearly could exceed $100,000.00 or more, in an effort to address, investigate and defend against Defendant's "equalization" of debt theory. Discussion/Request for Relief

10. Based on the foregoing, Cadle requests that the Court conduct an immediate hearing and enter an order:

a. Prohibit Defendant from asserting in any pleading filed in this action that the reason Pratt Jr. did not receive a distribution under his mother's Will was because Defendant advanced sums to his son from his mother's testamentary estate; and

b. Strike Defendant's Motion, particularly as it relates to any assertion that the reason Pratt Jr. did not receive a distribution was because it was clearly filed in bad faith; and

c. Find that Defendant's Motion for Summary Judgment and Defendant's position with respect to the "equalization" of debt theory was asserted in bad faith, impose sanctions against Defendant and his counsel, jointly and severally,[3] and award Cadle a sum of money sufficient to permit it to recover all of its attorneys' fees and costs incurred in having to develop evidence to refute Defendant's "equalization" of debt theory, such amount to be determined, if necessary, by affidavit or testimony to be provided to the Court at a subsequent time or hearing.

Request for Status Conference and Emergency Hearing

11. Cadle's response to Defendant's Motion is due to be filed on Monday. Part of that response will be directed to Defendant's position that he did not distribute any money to Pratt Jr. under his mother's Will and that he offset "loans" Pratt Jr. owed his mother against any such distribution owing thereunder. Trial is set for June 6, 2005. Expert witness reports are due to be finalized on April 22, 2005. It is imperative that the Court consider this matter as quickly as possible so that Cadle will now whether it must expend additional, significant and costly resources in responding to bogus claims and positions asserted by Defendant in this action. Therefore, Cadle requests that the Court set this matter for status conference and hearing no later than Friday, April 15, 2005, or as soon as possible thereafter.

Conclusion

Defendant's "equalization" of debt theory, maintained by Defendant for over 2 years and prior to the inception of this action, is and always was a sham. The sham position was perpetuated by the lies of Defendant, his administrative assistant, and Pratt Jr.'s brother and sister, through their sworn testimony in depositions and affidavits filed with the Court. Defendant's counsel asserted the sham "equalization" of debt theory in pleadings filed with the Court when he clearly knew or should have known through reasonable inquiry that the position was false. Unfortunately, the sham theory was hidden from Cadle until just this week. Defendant should not be permitted to benefit from his misconduct. The Court should look closely at whether and to what extent counsel for Defendant should be sanctioned under Rule 11.

Defendant should not be permitted to present an alternative theory at trial as to why he failed to distribute money under Crystal Pratt's Will to Pratt Jr., Defendant's Motion (as it relates to Cadle's breach of fiduciary duty claims) should be stricken, Defendant (and, if necessary, his counsel) should be ordered to reimburse Cadle for its fees and expenses incurred in having to respond to and refute Defendant's known sham position. Cadle requests such other and further relief to which it may be entitled under the circumstances.

Dated: April 14, 2005.

Respectfully submitted,
BELL NUNNALLY & MARTIN LLP
Bruce W. Akerly
State Bar No. 00953244 Linda D. Thai
State Bar No. 24042024
1400 One McKinney Plaza
3232 McKinney Avenue
Dallas, Texas 75204-2429
(214) 7401430 Telephone
(214) 740-1421 Facsimile
ATTORNEYS FOR PLAINTIFF THE CADLE COMPANY

Footnotes

[1] A true and correct copy of Defendant's Motion for Summary Judgment is attached in the appendix to this Motion (referred to herein as "App.") at 1-3.

[2] Deposition testimony in this regard will be made available to the Court at the time of the hearing on this

Motion. Defendant's counsel represented Evelyn Johnstone at her deposition and drafted all of the affidavits and pleadings at issue.

[3]Rule 11 of the Federal Rules of Civil Procedure provides, in pertinent part, that by signing and fling a pleading with the Court:

> an attorney...is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances -
>
> (1) it is not being presented for an improper purpose, such as to...cause ...needless increase in the cost of litigation;
>
> ***
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Cadle requests that the Court, on its own initiative, pursuant to Rule 11 (c)(1)(B) of the Federal Rules of Civil Procedure, enter an order directing counsel for Defendant to show cause why he has not violated Rule 11 (b) of the Federal Rules of Civil Procedure. Cadle has requested that counsel for Defendant retract all pleadings that make the

"equalization" of debt statements and allegations. As of the filing of this Motion, this has not taken place. However, simply withdrawing Defendant's Motion is not a sufficient remedy under the circumstances because of the time and expense Cadle has incurred in responding to Defendant's "equalization" of debt theory throughout this action.

Defendant opposed Cadle's breach of fiduciary duty claim by asserting that he offset "loans" Crystal Pratt made to Pratt Jr. prior to her death. There is no way that Defendant's counsel, in possession of Defendant's documents can claim that they ever supported the "equalization" of debt theory - the testimony of Defendant and Ms. Johnstone clearly indicate they never did, and he should have realized this immediately and taken steps to retract Defendant's position and allegations prior to Cadle having to undertake discovery, investigation of counsel, and retaining experts, on that position and expend thousands of dollars of attorney and expert witness time and expenses.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature.

Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by an affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to the Court.

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after a reasonable inquiry under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How Initiated.*

(A) By Motion.

A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses, including attorney's fees incurred in presenting or opposing the motion. Absent exceptional

circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On the Court's Initiative.

On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) *Nature of a Sanction; Limitations.*

A sanction imposed for violation of this rule shall be limited to what sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order.

When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery.

Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

FED. R. CIV. P. 11 (2007).